CRP 7/2007
BEFORE

THE HON'BLE MR.JUSTICE HN SARMA
JUDGMENT (ORAL)

This revision petition has been filed challenging the legality and the validity of the order dated 20.11.2006 passed by the learned Civil Judge (Junior Division) No 1, Guwahati, acting as a executing Court passed in Misc (J) Case No 347/2005 arising out of T Ex No 16/04, rejecting the application filed by the petitioner under section 47, CPC in the execution proceeding.

2. I have heard Mr SP Roy, learned counsel for the petitioners and Mr A Das, learned counsel for the opposite party/ decree-holder.

3. The opposite party/ decree-holder as plaintiff instituted the Title Suit No 89/93 praying for declaration of right, title and interest over th e suit land and khas possession thereof by evicting the defendants and for perma nent injunction. The learned trial court decreed the suit on 30.6.98 against whi ch Title Appeal No 29/98 was filed. The learned appellate Court also confirmed t he decree passed by the learned trial Court dismissing the appeal on 10.7.2003 which was further confirmed by the High Court in RSA No 141/2003 vide judgment a nd order dated 9.12.2003.

4. during the pendency of the said suit, the defendant No 1, Nekibu r Rahman having expired, his legal representatives were substituted in the suit who were arrayed as the defendant Nos 1 to 5.

5. Records disclose that the defence raised by the defendant No 1 N ekibur Rahman in the suit, inter alia, was that he was in occupation of the suit land since 1984 as a tenant of one Chakrapani Brahmin who purchased the land in question vide Sale Deed dated 11.5.74 and got his name mutated and the defenda nt came to reside in one of the houses over the suit land as his tenant. It wa s further case of the defendant that an agreement was made by and between them t o purchase the land on 17.2.88 and, as such, on the basis of the said agreement, he continued to stay in the said land adversely to the pattadar. The learned tr ial court considering the said defence in Issue No 6 decided the same against t he defendant holding that the defendant was encroacher of the suit land.

6. The learned appellate Court also did not disturb the aforesaid finding arrived at by the learned trial Court in Issue No 6 and the said decisio n was again affirmed by this Court in RSA No 141/2003 vide judgment and order da ted 9.12.2003. The said judgment of the High Court Court was also challenged in SLP by the defendant which was rejected by the Apex court in Case No 4248/ 200 4 vide order dated 5.7.2004. After attaining the finality of the adjudicatory pr ocess, the petitioner put the decree into execution by filing T Ex No 16/2004.

7. The judgment-debtor again resisted the execution of the decree b y raising various pleas. However, all these pleas so taken by the judgment-debto rs were turned down by the Courts by various order. In fact, this Court also had the occasions to deal with the applications under Article 227 of the constituti on of India filed by the defendant-decree-holders in WP(C No 4516./2005. The dec ree-holder also filed such applications challenging the orders of the learned Ex ecuting Court allowing to file petitions under section 47, CPC, by Musstt Rekia Begum and Musstt Sakia Begum. Both the petitions under Article 227 were heard an d dispose of by this ?court on 22.9.2005 rejecting the claim of the judgment-deb tor and allowing the prayer of the decree-holder / respondent. In the said judgm ent a direction was also issued to finalize the execution case with utmost exped ition.

8. Yet the judgment-debtor approached this Court by filing another

application which was registered as WP(C) No 1775/2005 challenging the order of the learned executing Court which was also rejected on 9.3.2005 wherein also a direction was issued to execute the decree expeditiously preferably within a period of two months from the date of furnishing a copy of the order. While the resistance to execute the decree was going on before the learned Executing Court from the side of the judgment-debtor, at this stage, the present petitioners claiming themselves to be the daughters of the original defendant late Nekibur Rahman filed another set of application under Order 21, Rules 99 and 100 read with section 47, CPC, claiming that they are in possession of a part of the suit property and accordingly, they have got substantial interest thereon suit was decreed without impleading them and prayed for declaration of their interest and to hold the decree as inexecutable.

9. In the said petitions filed under Order 21, Rules 99 and 100 read with section 47, CPC, the present petitioners asserted the same fact as pleaded by the original defendant Nekibur Rahman in his defence in the suit to the effect that their father was a tenant under Chakrapani Brahmin and there was an agreement for purchase of the land and houses of the entire plot of land by their father Nekibur Rahman and after demise of their father they are now in occupation of the suit properties. It is also alleged that in the suit, appeal and other proceedings so far concluded and pending, they have not been impleaded as party respondents and accordingly, when they came to know about the execution case, they on 4.11.2005 filed the aforesaid applications. The decree-holder/ respondent resisted the same by filing written objection on 19.5.2006 denying the allegations made by the petitioners. In the said objection it is also pointed out that after expiry of Nekibur Rahman, the original defendant, his legal heirs were brought on record who sufficiently represented the estate of the deceased defendant.

10. After granting several adjournments on the prayer of the petitioners, the matter was finally set down for hearing by the learned executing Court on 8.6.2006, 29.6.2006, 18.7.2006, 24.8.2006, 15.9.2006, 6.11.2006, 14.11.2006, 15.11.2006 and 16.11.2006. On 15.11.2006, the decree-holder was heard and the matter was again fixed on 16.11.2006 for further hearing on which date also it was adjourned at the prayer of the petitioners refixing for further hearing on 20.11.2006. On 20.11.2006, the petitioners did not appear and accordingly, the Court fixed the matter on 12.12.2006 for necessary orders. After passing of the order the petitioners appeared and filed an affidavit stating to be the affidavit evidence of the petitioner No 2 as PW- 1. The learned Executing Court considering the fact that the argument was heard in part and the petitioners did not pray for such affidavit evidence and the opposite parties having already submitted their oral arguments, the same was not accepted and fixed the case for order on 12.12.2006. Challenging the said order dated 12.12.2006, the present petition under Article 227 of the Constitution of India has been filed.

11. Notice having been served as revealed from the earlier orders passed by this Court after the death of the original defendant Nekibur Rahman, his legal representatives representing the estate of the deceased were brought on record by way of substitution before the learned trial Court. The petitioner raised similar objection as raised by the original defendant Nekibur Rahman regarding the arrangement to occupy half of the suit land from Chakrapani Brahmin which was pleaded by the present petitioners as principal objection in their application filed under Order 21, Rules 99 and 100 read with section 47, CPC. The said defence which is similar in nature was taken by the original defendant and was rejected by the learned trial court after due consideration which was affirmed even by the Apex court. The judgment dated 20.9.2005 passed in WP(C) No 4516/2005 and WP(C) No 5315/2005 disclose that apart from the legal heirs, namely Mir Yusuf Hussain, Musstt Rekia Begum and Musstt Sakia Begum, there are no other legal heirs of the original defendant Nekibur Rahman or his deceased wife Anisa Begum and the learned counsel appearing for the judgment-debtor could not point out as to the availability of any other legal heirs of Anisa Begum who was the wife of

the original defendant and who got legally substituted in the trial Court, itself.

12. Further findings of the learned Courts below at paragraph 18 of the judgment is that there was nothing to show that there are legal heirs of Anisa Begum except her one son and two daughters. Even the learned counsel for the judgment-debtor on being asked during the course of hearing could not point out any one .

13. In the conspectus of the materials available on record, it is, prima facie, difficult to accept the genuineness or otherwise of the claim made by the present petitioners in their applications filed under Order 21, Rules 99 and 100 read with section 47, CPC, more particularly, when the basis of right claimed has already been finally adjudicated, as indicated above.

14. Mr Roy, learned counsel for the petitioner, has submitted that the learned trial Court ought to have decided the matter like that of a suit under the provisions of order 21, Rules 99 and 100 (1), CPC, inasmuch as, they were physically occupying a part of the suit land and they were excluded from impleading in the proceedings. There is no dispute to the proposition of law that an application filed under Order 21, Rules 99 and 100, CPC, is to be decided independently as no other remedies available to such possessors of any decreetal land. The law requires that such an application is to be adjudicated against which an appeal lies like that of a decree.

15. As observed hereinabove disclose that the grounds taken by the petitioners in their petition is that they were not impleaded as party to the proceedings and they are in possession of a part of the suit property after expiry of their father who made an arrangement with Chakrapani Brahmin, the original owner of the land. The aforesaid facts as already adjudicated during the trial, the claim of right as sought to be projected by the petitioners flows from the grants allegedly made by Chakrapani Brahmin to their father. All the Courts right from the learned Civil Judge (Junior Division) to the Apex Court did not accept the aforesaid plea which was finally raised by the original defendant Nekibur Rahman and adopted by the impleaded defendants.

16. The learned counsel for the petitioners has not annexed the copy of the affidavit evidence allegedly submitted before the learned trial Court nor the same could be produced even after calling for the same by the Court. In course of hearing, the learned counsel also could not point out or other highlight any right except those stated in the application under Order 21, Rules 99 and 100, CPC.

17. The aforesaid facts clearly demonstrative of the irresistible conclusion that the present petition has been filed by the petitioners in order to delay in execution and frustrate the decree obtained by the decree-holder way back on 30.6.98. In the facts and circumstances of the case, the learned executing Court has not committed any jurisdictional error in passing the impugned order that too after hearing petitioners. It is the principle of law that although such an application is filed under Order 21, Rules 99 and 100, CPC, is to be decided like that of a suit but the same is to be decided in a summary manner. The ratio of the decision reported in 2006 (1) GLT 752 (Manju Boro & Ors Vs Karuna Kanta Boro and Ors) as cited by the defendant is not out of the context in this regard.

18. The facts of the case and the various decisions of different Courts of different hierarchy disclose that after the death of defendant No 1 his estate is properly represented by the existing legal representatives. The petitioners have not claimed any separate or distinct right that what was claimed by the original defendant. In a recent case, reported in 2006 (14) SCALE in (Sanjay V

erma Vs Manik Roy and others), at Paragraph- 11 the Apex Court approving the earlier decision of the Apex court in the case of Dhurandhar Prasad Singh Vs Jai Prakash University and ors reported in (2001) 6 SCC 534, held as follows:

Under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record and yet, as pointed out by Their Lordships of the Judicial Committee in Moti Lal V. Karrabuldin (ILR (1898) 25 Cal 179) he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial committee said in Prannath Roy Chowdry v. Rookea Begum (1857-60) 7 MIA 323), a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings. .

19. Considering the materials made available and keeping in view the factual matrix of the case, this Court has no hesitation to hold that the application under Order 21, Rules 99 and 100, CPC, was not filed bonafide by the petitioner raising any substantial issue to be decided again but it was filed only to delay and defeat the execution process.

20. In view of the aforesaid discussions, this revision petition stands dismissed with costs of Rs. 5000.00. The learned Court below is directed to execute the decree within a period of six weeks and to report compliance.

21. The costs so awarded made condition precedent for participation of the petitioner before the trial Court.